The Consumer Rights Directive and the proposal for a regulation on a Common European Sales Law (CESL) : Do they promote consumer confidence?

ISSN 2239-7345

2013-1/10-COLSI

Istituto Universitario di Studi Europei
Working Papers Series

http://workingpapers.iuse.it

COLSI
Consumer Law
and Social Issues

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The Consumer Rights Directive and the proposal for a regulation on a Common European Sales Law (CESL): Do they promote consumer confidence?

Cristina Poncibò[1]

Abstract

The purpose of this IUSE working paper is to explore the impacts the Consumer Rights Directive and the proposal for an optional Common European Sales Law (CESL) have on the evolution of EU Consumer Law. The aim of both the directive and the Common European Sales Law is to boost consumer confidence, which is inevitable for cross-border transactions. The IUSE working paper, first, introduces the new legislative framework and, then, discusses, by relying on the results of behavioural economics about consumer contracts, whether consumer confidence in the internal market would be really enhanced by the adoption of such measures.

The Consumer Rights Directive

Consumer contracts are extensively regulated under European Law. The next Sections aims to analyse, in particular, the CRD and the CESL to consider if behavioural economics has somehow influenced these new measures. In particular, our analysis will show the CRD and the CESL do not adequately deal with the above indicated problems of information overload - on the contrary, they increase the amount of information – and the sunk cost effect. Precisely, especially the pre-contractual phase as designed by the CESL increases the time and the efforts to enter the contract and, consequently, it increases the sunk cost effect.

Following a three-year legislative process the Consumer Rights Directive (CRD) was adopted in October 2011.[2] Less ambitious than the original proposals, the CRD nevertheless extends the maximal harmonisation approach to a number of aspects concerning the pre-contractual information duties and right of withdrawal in business to consumer (B2C) off-premises and distance contracts and also introduces other new features to the Consumer Acquis. It represents a conservative consolidation and, thus, its contribution to the development of European consumer contract law is therefore deemed quite limited by legal scholars.[3]

The CRD marks the culmination of a lengthy review process of the Consumer Acquis relating to contracts.[4] The focus is therefore primarily on the internal market, rather than on ensuring an optimum level of consumer protection for the whole of the European Union and it occasionally gives preference to trader interests rather than those of consumers. It represents a significant change to the landscape of European Consumer Contract Law, and it will replace, as of 13 June 2014, the directives on doorstep selling[5],

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[2] Council Directive on consumer rights 2011/83 of 25 October 2011, OJ [2011] L304, 64-88.
[3] E. Hondius, 'The Proposal for a Directive on Consumer Rights: The Emperor's New Clothes?' (2011) 19 European Review of Private Law, Issue 2, pp. 163-166. Kåre Lilleholt, 'Notes on the Proposal for a New Directive on Consumer Rights' (2009) 17 European Review of Private Law, Issue 3, pp. 335–343.
[4] Council Directive on consumer rights 2011/83 of 25 October 2011, OJ [2011] L304, 64-88.
[5] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372, 31-33.

distance selling, unfair terms and consumer sales with one new measure. The directive has recently been followed by the adoption of the new timeshare directive.[6]

"Full harmonisation" is the most controversial aspect of the directive.[7] The Acquis communautaire on consumer contract law has developed very slowly and in a rather piecemeal fashion. It has been criticised widely for its incoherence, as well as the gaps that exist. It is regrettable that the Acquis review has not cast its net wider to encompass also those directives, as well as other relevant consumer directives such as the Distance Marketing of Financial Services Directive (2002/65/EC) and even the Product Liability Directive (85/374/EEC). The aim for greater coherence is somewhat undermined by the existence of other directives which continue to deal with specific topics using the vertical approach. Anyway, the directives to be replaced by the directive on consumer rights are all so-called "minimum harmonisation" directives, which means that whilst the directives lay down a minimum level of consumer protection, there is room for Member States to maintain or introduce provisions which are more favourable to consumers than the directive themselves. In order to understand how widely the Member States have availed themselves of this opportunity, and to assess the consequences of this, the Commission funded a major research project to track the transposition of eight consumer law directives, including the four to be replaced by the said directive. This revealed a substantial level of variation in national consumer laws, despite the harmonisation effort made by these earlier directives. Consequently, the Commission proposed not only to improve the quality of the legislation through the adoption of a horizontal measure, but also to abandon the policy of minimum harmonisation in favour of a full harmonisation approach. It outlined its plans in the Green Paper on the Review of the Consumer Acquis.[8] The Green Paper favoured adopting a horizontal approach, rather than reviewing each directive vertically, in order to reduce the volume of the Acquis. This would produce a simplified regulatory framework.[9] The advantage of the horizontal approach is that the overall Acquis could be more coherent and, in particular, utilise consistent definitions and terminology. The directive on consumer rights takes the horizontal approach and provide common definitions: many of them have been broadened to cover a much wider range of transactions, notably those of "sales contract", "service contract", and "distance contract", which cover the vast majority of all consumer transactions.

However, whilst this might appear to be a positive development, any evaluation needs to take into account also the shift to full harmonisation and the substance of its provisions. The shift to full harmonisation is stated in Article 4 according to which "Member States may not maintain, or introduce, in their national law, provisions diverging from those laid down in this directive." Thus, the directive will fix the level of consumer protection for the transactions, which fall within its scope,, with no room left for regional or national variation.

[6] Council Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L 33, 10-30.

[7] J. M. Smits, '*Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights*' (2010) 18 ERPL 5,14. M. Ebers, '*From Minimum to Full Harmonization - The Proposal for a Directive on Consumer Rights*' (2010) 2 InDret, 1, 47. W. H. Van Boom, '*The Draft Directive on Consumer Rights: Choices Made and Arguments Used*' (2009) 5 *Journal of Contemporary European Research* 452, 464. Vanessa Mak, '*Review of the Consumer Acquis: Towards Maximum Harmonization?*' (2009) 17 *European Review of Private Law*, Issue 1, pp. 55–73.

[8] EU Commission Green Paper on the review of the consumer acquis, Brussels, 08.02.2007, COM (2006) 744 final.

[9] The use of a horizontal directive would, however, appear only to have a limited potential for simplifying the regulatory framework, because directives need to be transposed into national law, and Member States are not required to copy out a directive verbatim in one single measure.

The Commission seeks to justify this development on two grounds: the first is the diversity and incoherence related to the use of the minimum harmonisation clauses in earlier directives; and the second is the provision on consumer contracts in the Rome-I Regulation on the law applicable to contracts.[10] With regard to the first, the Commission argues that there is low confidence in cross-border consumer shopping, and that one of the reasons for this is the fragmentation of the Acquis and the uneven level of consumer protection across the member states. At the same time, businesses are reluctant to offer their goods and services across the internal market because of the differences in consumer protection and the need to adapt business models to different national markets. The solution therefore is to abandon minimum harmonisation and to adopt one standard across the European Union. This argument sounds attractive, but some scepticism has been expressed by legal scholars with regard to the real impact of legal diversity on consumer and business confidence: evidently, there are many more practical factors which are more likely to act as a deterrent, be it language barriers, lack of trust in unknown businesses, concerns regarding the practicality of transporting goods over long distances, as well as unease over the prospect of satisfactorily resolving disputes across borders. Full harmonisation will not resolve these problems.[11]

As for the second reason, Art. 6 of the Rome-I Regulation provides that the law applicable to a consumer contract is that of the country of the consumer's habitual residence where the trader either pursues his activities in that country, or directs, by any means, his activities to that country (or to several countries including that country). But even where the law of the consumer's habitual residence do not govern the contract, the mandatory consumer protection rules of the consumer's country will still be applicable. That being the case, there is still a risk that traders might be reluctant to offer their goods or services to certain countries if that would mean having to comply with different consumer protection standards. One can question whether the issues covered by the directive and primarily full harmonization will result in a significant increase in cross-border activity.

Even if the case for full harmonisation is made out at the level of principle, one can raise very serious concerns about its opportunity. Consumer law is a *lex specialis* which effectively derogates from general contract law. The directive will therefore have to slot into the legal framework created by national general contract law. It is well known that national contract laws differ considerably from jurisdiction to jurisdiction, and despite the proposal concerning a Common European Sales Law discussed in the next sections, this situation will not change in the foreseeable future. One of the key advantages of the minimum harmonisation approach has been the possibility to retain existing provisions, but these were not always consumer-specific rules – in some instances, generally applicable rules offered a higher level of protection to a consumer than the harmonised standard.

On the whole, the directive re-enacts much of what is already in the Consumers Acquis, with some tidying-up of the terminology.[12] There are also a few scattered additional

[10] Council Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.
[11] J. M. Smits, 'Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 ERPL 5,14.
[12] G. Howells and R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009); B. Jud and C. Wendehorst (eds), *Neuordnung des Verbraucherprivatrechts in Europa?* (Vienna: Manz, 2009); H.-W. Micklitz and N. Reich, '*Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights*' (2009) 46 *Common Market Law Review* 471–519; H. Schulte-Nölke and L. Tichy´ (eds), *Perspectives for European Consumer Law* (Munich: Sellier, 2010); P. Rott and E. Terryn, '*The Proposal for a Directive on Consumer Rights*' 3(2009) *Zeitschrift für Europäsiches Privatrecht* 456-488 and C. Twigg-Flesner and D. Metcalfe, '*The Proposed Consumer Rights Directive – Less Haste, More Thought?*'3 (2009) *European Review of*

provisions, but these do not significantly raise the overall level of consumer protection. The main difference is the deletion of the minimum harmonisation clause, and the elevation of much of what is currently a minimum standard to full harmonisation. General contract law at national level could turn out to be more favourable in some respects than the legislation transposing the directive, leading to the paradox that it may be better for an individual not to be a consumer. This possibility has rightly been criticised by Wilhelmsson as a "legal mess", and it is regrettable that insufficient thought appears to have been given to this outcome so far.[13]

In addition, one problems identified with the current Acquis are the problems caused by the transposition of directives into national law, partly due to the existence of minimum harmonisation clauses, but also simply due to errors and omissions made by the Member States during this process: this means that the national legislation transposing a directive could be found in all sorts of different places; this much is acknowledged by the Commission, which tries to present this as a positive aspect, arguing that transposition of a directive would "allow a smoother implementation of the Community Law into the existing national contract laws or consumer codes" and give Member States enough leeway to maintain existing provisions which already comply with the objectives of the directive. But the end result will still be diverse national laws, potentially using very different language or concepts, to give effect to the directive. Whilst the directive produce the same level of consumer protection across the EU in respect of the areas it regulates, consumers and traders would still need to identify the corresponding national legislation if they were ever in a position where recourse to the law became necessary, or seek advice on the relevant national law – one of the matters which harmonisation is intended to reduce. The Commission's view that "the implementation of a directive may give rise to a single and coherent set of law at national law which would be simpler to apply and interpret by traders" sound overly optimistic.

Information disclosure in the CRD

The regulatory technique based on the provision of information lies at the hart of the CRD: by requiring that a huge number of information is made available to consumers, it aims to reduce the information gap, giving the consumer the choice between different kinds of goods and services in an informed way. This according to the traditional informational approach for consumer we have introduced in the section before about "Propensity to read, information overload and information processing" to clarify that this approach is not satisfactory in the light of results of the studies in economics and psychology regarding consumer behaviour.

A. Legal framework

The pre-contractual information obligations are covered in Articles 5-8. These articles are divided across two chapters: Chapter II, comprising only the consumer information for contracts other than distance or off-premises contracts, while Articles 6-8 of Chapter III

Contract Law 368–391.

[13] T. Wilhelmsson, '*Full Harmonisation of Consumer Contract Law?*' ZeuP (2008) 16, 225, 229.

cover the ground in the present legal framework, namely the consumer information obligations for distance and off-premises contracts.

Despite the consumer information duties only being in four articles, they involve extensive detailed rules encompassing a total of 64 sub-paragraphs containing a number of rules relating, for instance, to the scope of application, the content of the information, and when the information is to be given by the trader.

A new feature of the CRD with respect to the present *consumer acquis* is the inclusion in Article 5 of an information obligation to be fulfilled by the trader in a contract other than a distance or an off-premises contract. Precisely, the obligation applies in sales and service contracts not concluded in a manner that features all the required characteristics of either a distance or off-premises contract (Articles 2(7) and 2(8), respectively).

a) Distance and off-premises contracts

The information to be given in distance and off-premises contracts is covered in Article 6(1). This article consists of 20 different points of information, each of which contains further details as to the information to be given.

The new information requirements represent a radical change to the information requirements for doorstep selling (previously limited only to information on the right of withdrawal), but also expands upon the catalogue of information to be provided under the Distance Selling Directive. The list of information under Article 6(1) can be divided into mandatory and relevant information, though in both instances the information provided forms an integral part of the contract and cannot be altered absent express agreement (Article 6(5)).

b) Other contracts

As before suggested, Article 5(1) contains a catalogue of information obligations concerning eight different subject matters, each in turn consisting of various different elements. However, the extent to which the information on these matters is to be provided is limited by a number of factors: firstly, the information need not be provided if it already apparent from the context, secondly, in some instances some of the information requirements need not be fulfilled because they are not applicable either to the subject matter or the conditions of the contract. Finally, the notion of 'appropriate information' applies to the main characteristics of the goods and services: what is considered to be appropriate is not clear and it depends on the manner in which the information is presented and the nature of the goods or service.

B. Analysis

The disclosure paradigm adopted by the CRD represents an old and unsatisfactory regulatory technique[14]. In our view, the same instruments of disclosure have not helped

[14] O. Bar Gill, *Seduction by Contract: Law, Economics, and Psychology* in *Consumer Markets* (OUP 2011).S. I. Becher, Behavioral, *Science and Consumer Standard Form Contracts*, *Louisiana Law Review*, Vol. 68, 2007 at 131. Accessed December 2012 at SSRN: http://ssrn.com/abstract=1016002. O. Ben-Shahar, '*The Myth of the 'Opportunity to Read'* in *Contract Law*', *European Review of Contract Law*, 5(1), 2009 1-28. R. B. Korobkin, '*Bounded Rationality, Standard Form Contracts, and Unconscionability*', *University of*

consumers in the past, are highly unlikely to deliver any benefit, impose unnecessary costs, and might even have unintended harms. In particular, CRD's pre-contractual disclosures are likely to fail because consumers will not pay attention to them. As explained in the first part of this Chapter, consumers do not pay attention to standard forms, neither long nor short, in plain language or in legalese, written or oral, separately signed or unified into one document, handed out in advance or ex post. The failure of consumers to attend to mandatory information disclosure has been documented thoroughly, in area after area of consumer transactions and financial literacy.[15]

It is surprising that disclosure mandates in the CRD are still written without regard for the studies about people's cognitive abilities and literacy levels. They disregard consumer's reluctance to read texts that are unfamiliar and imposing: they do not read the disclosures because good things will rarely emerge from this exercise. It is time consuming, dull, largely irrelevant, and with the load of disclaimers and warnings it rarely conveys any good news, thus draining their enthusiasm from the transaction. Besides, if they read something they dislike, would they switch to another trader?

This does not imply that disclosure, as a regulatory tool, can never work. If mandated disclosure is to help consumers, a new approach must be adopted – one very different from the traditional paradigm that the CESL implements, and with far less ambitious goals. As discussed before, effective information tools come in very simple, aggregate metrics that consumers can easily understand and compare, like total cost of ownership or satisfaction ratings. Nevertheless, these fundamental insights have been totally underestimated in the design of these provisions.

The right of withdrawal

A. Legal framework

Generally, European Law gives consumers the right to withdraw from a range of contracts for goods and services.[16] As two authors note: "European law in this way recognizes the consumer's right to withdraw. There is no such generic right in the common law of contract or in the Uniform Commercial Code in the United States.

The adoption of the right to withdraw serves a number of purposes in EU Law, such as: protecting consumers from aggressive sales tactics, encouraging consumers to engage in long-distance purchases, encouraging consumers to use the internet to make purchases, and enabling consumers to understand complex contracts.[17] The right to withdraw has its origins in the national legal systems of various European countries, but in recent years it has emerged as a prominent feature of European contract law.[18]

Chicago Law Review, 70(4) 2003, 1203-1295. N. K. Malhotra, '*Reflections on the Information Overload Paradigm in Consumer Decision-Making*' *Journal of Consumer Research*, 10(4), 1984, pp. 436-440. J. Jacoby, '*Perspectives on Information Overload*', *Journal of Consumer Research*, 10(4), 1984, pp. 432-435.

[15] D. G. Baird, '*Pre-contractual Disclosure Duties Under the Common European Sales Law*', Accessed on 22 February 2013 at http://www.law.uchicago.edu/files/files/Baird%20Paper.pdf

[16] Similar rights are also provided by the directive which protects the consumer in case of contracts made at doorstep (Directive 85/577/EEC), the timeshare directive (94/47/ECC), the directive concerning distance selling regulations (Directive 2002/65/EC) and the directive concerning consumer credit (Directive 87/102/EEC).

[17] M. Loos, 'Rights of Withdrawal' in *Modernising and Harmonising Consumer Contract Law*, edited by Geraint Howells and Reiner Schulze (Munich: Sellier 2009) at 237-78.

A series of directives issued between 1985 and 2008 introduced the right of withdrawal in transactions relating to life insurance, real estate timeshares, and distance selling of goods and financial services, and consumer credit. In addition, Chapter 3 of the DCR recognizes a general right to withdraw for most distance and off-premises contracts (CEC 2008). The right to withdraw also appears in the 2008 draft Common Frame of Reference for European Private Law.[19] In all of these documents, the right of withdrawal simply provides the consumer the right to cancel the contract within a period of time after the contract has been entered. The consumer must return the goods or discontinue use of the services, and in return the seller must refund the purchase price. Typically but not always, the consumer must pay the cost of depreciation, if any.

In the CRD, the right to withdraw applies to "distance contracts" (where the seller and consumer make the sale using a means of "distance communication" such as a telephone or the internet) and "off-premises contracts" (where the seller and consumer conduct business in each other's physical presence but away from the premises of the business; CEC 2008, art. 2(6)-(8)). The seller is obliged to inform the consumer of the right to withdraw at the time of contracting (art. 9(b)). Now, the consumer has a 14-day period in which to exercise the right to withdraw. Withdrawal is entirely discretionary given that the consumer is not required to provide a reason for withdrawing from the contract (art. 12(1)). After the consumer exercises the right to withdraw, the seller must return any payments received within 30 days (arts. 16, 17(1)). Moreover, the consumer bears the cost of returning the goods unless the seller has agreed otherwise. The consumer is also liable for "any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods," unless the trader did not give notice of the right to withdraw prior to contracting. Likewise, the consumer is not charged for any benefit he derived prior to withdrawal. Thus, in the case of service contracts, the consumer is not liable for the cost of performance prior to the withdrawal from contract.[20]

B. Analysis

Behavioural economics helps us to identify three cases in which granting a withdrawal right may be justified given that there are information asymmetries at the time of contract formation, but also exogenous distortions of the consumer's preferences and endogenous distortions.[21] Consumers' contract decisions can be distorted by various external influences: surprise, time pressure and psychological entrapment might all contribute to a particular contract decision being based on the distorted preferences of a consumer. Interestingly, this strategy is also based on the idea that consumers, sometimes, make purchases in emotionally "hot" states that, in a cooler and more rational state, they would not make. In particular, the right to withdraw allows consumers to reframe their choices and gives them an opportunity for a rational reconsideration to overcome the influence of

[18] O. Ben-Shahar and Eric A. Posner, 'The Right to Withdraw in Contract Law', The Journal of Legal Studies, Vol. 40, No. 1 (January 2011), at 115-148.

[19] C. Von Bar, et al. *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich: Sellier 2008).

[20] There are numerous exceptions to the right of withdrawal. For distance contracts, examples include goods and services whose prices depend on fluctuations in financial markets, customized goods, sealed recordings and software that have been unsealed by the consumer, newspapers and other periodicals, gaming and lottery services, and auction contracts (CEC 2008, art. 19(1)).

[21] J. M. Smits, 'The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law' (2011) 29 Penn State International Law Review, 671, 684.

impulsive choice: it removes consumers from pressure by salespeople and gives them time to consider the contract in emotionally neutral situation.[22]

In this respect, the CRD show to have been influenced by the arguments of the behavioural economics in extending the right to withdraw so that the consumer has now a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring, generally, any cost.[23] Evidently, this measure expresses a soft paternalistic approach towards the consumer, because it aims to give time for reflection and to correct impulsive choices.

The most controversial point with both the CRD and the CESL's rights to withdraw rule concern the mandatory nature of this right. Some authors note that, in the absence of a mandatory duty, prime retailers routinely offer a right to withdraw, while low-end retailers do not: a voluntarily designed right to withdraw, thus, enables sellers to signal superior quality and reliability, while mandatory right to withdraw destroys this possibility.[24] In addition, a mandatory right to withdraw reduces sellers' ability to offer differentiated prices. Some consumers purchase extended return periods, while other consumers waive the right to return the product altogether in exchange for a lower price. (e.g. consumers buying cheap non-refundable airfares). Mandatory right to withdraw according to the CESL and the CRD will force these consumers to pay for a feature that they do not want.

The Common European Sales Law (CESL)

On 11 October 2011, the European Commission published a proposal for a Common European Sales Law (CESL), which traders may choose to use to govern their cross-border contracts. It covers the sale of goods, the supply of digital content and some related services.[25] With its proposal, the European Commission aims to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved in the view of the Commission by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.[26]

Effectively, the European Commission has made two separate proposals: one law for traders to use when selling to consumers; and one law for businesses selling to other businesses. Under the current law, as set out in the Rome I Regulation, a trader that directs its activities to a European Member State must comply with the mandatory consumer protection laws of that state. This may be a problem in internet and other distance selling where traders are dealing with consumers from many different states at once. Under the proposal, in cross-border sales, the trader could offer to contract under the new system of

[22] Office of Fair Trading, *Doorstep selling. A report on the market study* 2004, OFT 716.
[23] Art. 9 Parliament and Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 22.11.2011 L 304/64-88.
[24] O Bar Gill, O. B. Shahar 'Regulatory techniques in consumer protection: a critique of the Common European Sales Law', Working paper presented at the Conference on European Contract Law: A Law-and-Economics Perspective, April 27, 2012. Accessed 1 June 2012 at http://www.law.uchicago.edu/files/files/OBS-OBG%20paper_0.pdf
[25] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284 (COD).
[26] In July 2010 the Commission published a Green Paper, "Policy options for progress towards a European contract law for consumers and businesses" setting out a number of possible options to address the challenges presented by contract law to cross border trade. COM(2010)348 final 1 July 2010.

consumer contract law set out in this provisions. The trader would state that the goods were offered under the CESL and would provide a short information leaflet about it (around a page and a half long). If the consumer explicitly agreed, the law governing the contract would then be the CESL rather than a national system.

The key aim of the Commission's proposal for a new set of contract law rules for cross-border contracts was to remove barriers to cross-border trade. The evidence, however, suggests that the CESL will not promote cross-border trade and will be time-consuming and cumbersome to negotiate and implement.[27]It is possible to identify the following recurring critiques in legal scholarship:

- Evidence of need: some authors do not believe that sufficient need for the proposal had been demonstrated. They questioned the Commission's claims that the different contract laws of each Member State currently act as a barrier to trade or certainly not a sufficiently serious barrier to warrant such a complex and wide-ranging proposal. Other more significant barriers existed and they would not be dealt with by CESL.
- Legal uncertainty: some authors affirm that that the CESL would lead to uncertainty and incoherence, placing an additional burden on the national judicial systems and on the EU's Court of Justice.
- Confusion: a common concern is that the introduction of CESL would create more confusion for consumers and businesses, making it more difficult for businesses to agree contracts and for consumers to know their rights when purchasing cross-border.[28]
- Cost: scholars from the school of law and economics also suggest that the cost of the proposals would outweigh any possible benefits.[29]

Concerning the regulatory techniques for consumer protection the CESL maintains the traditional approach in requiring the provision of detailed information to the consumer and in extending their quantity without focusing on their format. Again, it does not effectively deal with the problem of information overload and it also increases the steps to enter the contract, thus, the sunk cost effect.

This is particularly evident with respect to the requirement of mandatory disclosure that is a standard staple of consumer protection: give people information to help them make better autonomous choices according to a dated paradigm. The interesting point consists in the fact that the CESL also include other techniques, based on the behavioural insights, for consumer protection, such as: mandatory pro-consumer arrangements, default rules, right to withdraw and, at the end, provides for optional standardized consumer contracts.

[27] J. Smits, 'The Common European Sales Law (CESL) Beyond Party Choice' (April 2012). Maastricht Faculty of Law Working Paper No. 2012/11. Accessed on 22 February 2013 at SSRN: http://ssrn.com/abstract=2039345.
[28] Proposal for a Regulation of the EU Parliament and of the Council on a Common European Sales Law, Brussels, 11.10.2011, COM (2011) 635 final, 2011/0284 (COD).
[29] H.W. Micklitz, N. Reich, 'The Commission Proposal For A Regulation on A Common European Sales Law (CESL)-Too broad or not broad enough?' EUI Working Papers Law No. 2012/04.

Information disclosure in the CESL

A. Legal framework

The CESL also mandates various mandatory disclosures, requiring informed parties to grant the consumer a number of information before he enters the contract (pre-contractual), and supervises over voluntary disclosures to grant their integrity, with causes of action against deception and fraud. Article 23 requires sellers to make plain the basic attributes of what they are selling. The seller of goods has a duty to disclose "any information concerning the main characteristics of the goods which [he] has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party". Whether any particular information needs to be disclosed turns on all the circumstances and these include such things as the special expertise of the seller, the cost to the seller consumer contracts the nature of the information, its importance to the buyer, and good commercial practice. This means that the seller has to explicitly disclose a variety of terms, ranging from the most basic (e.g., price, fees, payment and delivery, duration) to the more specialized (e.g., conditions for termination, post-sale services, digital rights limitations, right to withdraw and also the governing law).

In addition, the CESL mandates a 'duty of transparency', which is achieved in several ways. Boilerplate terms have to be communicated "in plain intelligible language" (Artt. 13-18, 20, 22, 27). Many of them have to be in writing (Artt. 82, 13 (3) (b), 13 (4) b). And drafters have "the duty to raise awareness" to terms that are particularly important-"a mere reference to them in the contract document" is not sufficient (Art. 18 for off-premises contracts). A separate and specific acknowledgement of assent is required, to ensure that information passed through. Thus, the consumer must receive not only the standard form contract in a durable medium, but also a separate disclosure regarding the right to withdraw and its limitations (Artt. 17 (4), 19 (5) and 41 (3)).

It is important to note that the CESL now requires the sellers use a uniform 'Standard Information Notice', a two-page pre-drafted form that consumers must receive in writing, separate from the sellers' standard form contract. This disclosure explains and highlights the "core rights" guaranteed by CESL, and provides a quick, two-paragraph tutorial of Sales Law.

The goals of this provision are far-reaching: "Consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. The use of the Common European Sales Law should be an informed choice. The trader should (…) provide information on its nature and its salient features". [30] In practice, consumers will likely have to sign two forms: the contract and the consent to use the CESL. In addition, it imposes requirements for distance contracts or electronic contracts: these requirements involve specific confirmatory memoranda and specific acknowledgment of disclosures.

[30] CESL, Articles 8 and 9 and Annex II.

B. Analysis

CESL's contract disclosures are likely to fail because consumers will not pay attention to them. As explained in the first part of this Chapter, consumers do not pay attention to standard forms, neither long nor short, in plain language or in legalese, written or oral, separately signed or unified into one document, handed out in advance or ex post. The failure of consumers to attend to mandated disclosures packaged in pre-drafted language, like ones CESL utilizes, has been documented thoroughly, in area after area of consumer transactions and financial literacy.[31]

Many factors account for this "non-readership" phenomenon. First, CESL alone requires a hefty amount of disclosures; far too time consuming for shoppers to investigate in the course of routine sale transactions. The typical CESL consumer would take home a "packet": the standard terms of the contract (embellished by specific terms that must be included); the right to withdraw disclosure; the actual withdrawal form; and the Standard Information Notice. In this respect, it is clear that the CESL will have detrimental effects on the level of consumer protection.

Interestingly, the same critique applies to certain U.S. Laws. Bar-Gill and Ben-Shahar openly criticise the sector specific disclosure mandates that are common in US Law for certain products (cars, appliances, food, drugs, timeshares, credit and insurance). Correctly they question whether consumers, even the most educated ones, are likely to read the Appendix, the Annex. The same applies to he CESL's pre-printed boilerplate.[32]

To pose an example, consumers will affirm that they agree to use the CESL. But will they read the above-mentioned 'Standard Information Notice'? And, if they read it, will they understand how it differs from national law to be affirmatively choosing it as a feature of their transaction? How many consumers will actually read the tedious terms in the written affirmation or remote contracts and re-evaluate their choice? It is true that one additional form, one additional signature, an additional click-all these are not too costly and will not slow down the wheels of commerce. But such costless mechanical gestures are not very beneficial either. If the CESL were true to its "conscious choice" rationale, it would require more thorough and meaningful procedures that would guarantee more than an appearance of choice. Those, however, would impose a significant transaction cost.

Some authors underline that the disclosure paradigm mandatorily employed by CESL risks to be also costly, because it compounds the transactions costs, with extra forms, signatures, clicks, and ceremony, thus extending the time and the waste involved in standard form exchange. It could also be considered "harmful", because the presumption of "informed consent" may weaken the effect of other protections: when a term is disclosed, there is a presumption that the consumer is aware of it.[33]

[31] D. G. Baird, 'Pre-contractual Disclosure Duties Under the Common European Sales Law', Accessed on 22 February 2013 at http://www.law.uchicago.edu/files/files/Baird%20Paper.pdf

[32] O Bar Gill, O. B. Shahar 'Regulatory techniques in consumer protection: a critique of the Common European Sales Law', Working paper presented at the Conference on European Contract Law: A Law-and-Economics Perspective, April 27, 2012. Accessed 1 June 2012 at
http://www.law.uchicago.edu/files/files/OBS-OBG%20paper_0.pdf

[33] Before at note 42.

Mandatory pro-consumer rules

A. Legal framework

The CESL is designed to provide consumers a high level of protection, and it features some regulatory techniques showing a paternalistic attitude, such as default rules and pro-consumer arrangements, the latter concerning substantive contractual rights, remedies, formalities, formation procedures, disclosures, warranties, and interpretation. The CESL safeguards its consumer protections by according them a mandatory and non-disclaimable status. While Article 1 declares the basic norm of "freedom of contract" and the right of parties to exclude or alter any of the provisions of the law unless otherwise stated, the remaining Articles state otherwise, unequivocally. In 31 different places, the following sentence appears: "The parties may not, to the detriment of the consumer, exclude the application of this Article [or Section, or Chapter] or derogate from or vary its effects".[34] To exemplify, all of the buyer's remedies are mandatory, as are the withdrawal rights, the disclosure rules, the interpretation rules, the restitution rules, the risk of loss provisions, some of the implied and express warranties, rules relating to notices and communications, interest for late payments, grace periods, all the prescription rules, and much more.[35]

In addition, the CESL bans a long list of terms by establishing that they are always considered unfair terms (i.e. black list. See the next Chapter about unfair terms). These include some of the most common choice of forum terms, such as mandatory arbitration or seller's home court. They also include "asymmetric" arrangements, for example, when the consumer is bound but the seller is not, or notice periods that are more lenient to the seller, or remedies that are more forgiving to the seller. Some terms are banned more "softly" by presuming them to be unfair (i.e. grey list). These banned terms are for example, the limitations to buyers' remedies, the one-sided termination rights, the terms allowing the seller to assign the contract to others, the terms requiring "excessive" advance payments and the restrictions on seeking supplies or repairs from third parties.

It is easy to say which elements of the contract are not mandatory. The "main subject matter of the contract" and the price are excluded from the unfairness tests, and are binding even if set unilaterally by the seller.[36]

B. Analysis

It is tempting to think that a pro-consumer mandatory regime would benefit consumers. Nevertheless, the pro-consumer terms in the CESL raise sellers' costs and sellers will pass-on (at least some of) these increased costs to consumers in the form of higher prices. Evidently, higher prices are not inherently bad: consumers may prefer high-quality products with a high level of consumer protection, even if these high-quality, protection-intensive products cost more. But consumers might also prefer to pay a lower price and get

[34] CESL, Articles 2, 10, 22, 27, 28, 29, 47, 64, 69, 70, 71, 72, 74, 75, 77, 81, 92, 99, 101, 102, 105, 108, 135, 142, 148, 150, 158, 167, 171, 177, 186.
[35] CESL Arts. 2, 10 (3-4); Ch. 2, Sec. 1 (10 articles); Ch. 2, Sec. 3 (4 articles); Arts. 28, 29;
Ch. 4 (8 articles); Arts. 64, 69, 70, 71, 72, 74, 75 (2), 77; Ch. 8 (8 articles); Arts. 92 (2), 99
(3), 101, 102, 105; Ch. 11 (17 articles); Arts. 135, 142, 148 (2), 150 (2), 158, 167; Ch. 16, Sec. 3 (4 articles); Ch. 17 (6 articles); Art. 186.
[36] CESL, Article 80(2).

lower quality products with a lower level of consumer protection. People often waive warranty programs, or buy non-refundable items, or choose the slowest delivery option, or decline to insure, because they are cheaper. To exemplify, a thirty-day grace period, or a generous remedy, or easy no questions asked termination option, are surely beneficial to consumers, but they are also costly to sellers, resulting in higher prices. If most consumers prefer these perks, sellers would offer them and lure consumers with them.

The fact that they do not-and that the law needs to mandate them-suggests that most consumers prefer the discount. The preceding discussion grounds on the idea that consumers as a group would benefit from strong protections once these protections are priced. Indeed, one of the fundamental objectives of the CESL, and the entire harmonization project, is "to grant access justice to those who are excluded from the market or to who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market." It is clear now that this measure surely increases the costs of the products, while it is unclear whether it would really grant access to justice for the consumers.

In addition, consumers are a heterogeneous group, with different preferences and different budgets, while some consumers may prefer to pay high prices for strong protections, others may prefer the low price and they are also heterogeneous with respect to their propensity to benefit from protection itself. Some consumers enjoy a given protection more than others. For example, the right to sue the seller in court rather than arbitration, or the right to obtain strong remedies for breach, is more valuable to consumers who are systematically more likely to enforce these rights. To others, often the majority, the enhanced access to court and remedies are less beneficial: many consumers are not aware of their legal rights and protections, or waive them.

Indeed, the Euro barometer survey, cited and relied on by the Commission in proposing the CESL, shows that consumers report a preference for arbitration over litigation. Since sellers are generally unable to separate, in advance, the more v. less litigious consumers, all consumers will pay the price of the protections that only the few enjoys. Evidently, the wealthier consumers are systematically more likely to invoke the protections. People need to be informed about these rights, to have the sophistication to insist on compliance, and to afford legal advice. The poor, the elderly, the less educated-those for whom the protections are enacted in the first place lack the information, sophistication, and resources. And yet, they bear an equal share of the cost.

To conclude, consumers may fail to make good decisions either because of asymmetric information, or because of imperfect rationality (and often the combination of the two). A rational, informed consumer would selectively bargain for the protections that are worth the added price. Less sophisticated consumers might not fair so well in a laissez-faire environment: they might fail to appreciate certain risks or powers, and so they might underestimate the importance of certain protections; thus, when sophisticated sellers face such consumers, the market equilibrium may include an inefficiently low level of consumer protection.

Thus, the problem with the CESL stays in the excessive number of pro-consumer mandatory arrangements that risk of being too costly for consumers in a period of economic crisis, including for the poor and elderly. While some key mandatory rules would have been sufficient to grant an adequate level of consumer protection for the less sophisticated consumers.

Pro-consumer default rules

A. Legal framework

Because many of the pro-consumer arrangements in the CESL are mandatory, there is a lesser role for default rules. Still, the CESL includes several pro-consumer gap-fillers. Recognizing, however, that standard default rules are easily disclaimed by traders, the CESL bolsters its default provisions by making them more difficult for drafters to unilaterally alter. The CESL's rules on conformity are a good example of pro-consumer, sticky defaults: they stipulate conformity requirements, including fitness for ordinary and particular purposes, but maintain that derogation from these standards "to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods, or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it". Again, opt-out is allowed only after the consumer expresses conscious, informed consent. Contract terms are often ambiguous and require interpretation. Moreover, the CESL establishes that ambiguous terms in consumer contracts will be interpreted in a pro-consumer way: "Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer".

B. Analysis

Pro-consumer defaults in consumer contracts have only limited effect because the traders can easily replace them with standard form terms, without incurring any added transaction costs, and often without even alerting people and raising suspicion. In consideration of this limitation, the CESL imposes special consent requirements.

This solution is therefore unsatisfactory for the following reasons. Consider the "no additional payments" default according to which the consumer has to express an explicit consent to the additional payment term. But, how difficult would it be for the seller to obtain the explicit consent of the consumer? The latter would simply need to sign her name on another line or, perhaps, even on a separate form.

It is thus clear that, in choosing to enact these provisions as default, rather than mandatory rules, the CESL surely intended to preserve some room for freedom of contract, but to safeguard against mindless opt outs. It requires that consumers "know" and pay special attention to a reversal of the defaults, but the law's primary device for alerting people and informing them is mandated disclosure, and so the regulation of opt-outs is merely another disclosure requirement. To those who believe that lengthy pre-contractual disclosures are effective in protecting consumers, this "sticky default" technique has obvious appeal. Again, such argument does not take into adequate consideration the insight of behavioural economics about ineffective disclosures discussed before in this Chapter. Traders would figure out the disclosure templates that are regarded by courts as reasonable and use them to direct their clients away from the pro-consumer default rules.

Conclusion

From our analysis it emerges that the CRD and CESL adopt regulatory techniques to protect consumers based on both a libertarian approach towards the consumer (e.g. information disclosure) and a paternalistic one (for example, mandatory pro-consumer arrangements).[37] The latter is present in his various forms (hard and soft). Clearly, it emerges a lack of clarity about the conceptual grounds of these provisions and confusion between regulatory strategies. In addition, the regulation based on nudging the consumer is limited and not well designed as in the case of the right of withdrawal. It would have been necessary to clarify the selected approach or approaches and, then, apply them in a more coherent framework.

Interestingly, there is evidence that information disclosure protection remains central (indeed is enhanced) in both measures and this choice by EU institutions can be criticized on various grounds. First, extensive past experience in consumer protection - supported by the results of behavioural economics introduced in the first sections - suggests that standard consumer "informed consent" techniques have proven to be unsatisfactory, especially with respect to information (mandated) disclosure. Consumers do not read contracts whose terms are beyond most people's care, or understanding. Second, while novel approaches to the format of information disclosure are being experimented[38], both the CRD and the CESL disclosure paradigms ignore these attempts to develop a "smarter" disclosure paradigm for consumers. In this respect, one may conclude that these measures are "missed opportunities" to "modernize" the legal framework for consumer protection. It is difficult to say that the CESL Standard Information Notice and other documents would increase consumers' propensity to read: on the contrary, given the amount of pages at issue, they would probably decrease consumers' willingness to read. Thus, our conclusion is that the Consumer Rights Directive and the CESL would not enhance consumer confidence in the internal market.

Evidently, the adoption of a sort of "EU label for consumer contracts" represents the most relevant innovation brought by the CESL in the field of consumer protection.

The rules contained in the CESL will contribute to the supply of an optional standardized contract, or better a variety of standardized optional contracts for goods and digital contents. Precisely, the mechanism of the CESL grounds on the fact that the CESL model contract in B2C relations may not be chosen partially, but only in its entirely (Art. 8 (3) of the Proposal). Moreover, business to consumer (B2C) contracts under the CESL is mainly subject to mandatory rules in favour of consumers (terms can be modified only if they are more favourable). Finally, all the other contract terms – except fro individually negotiated terms) are subject to the unfairness test. This leads to a quasi-mandatory standardization.

The underlying idea is that the CESL will ensure that consumers who enter into a transaction receive a contract with high-quality terms and that this "quality brand" will make makes cross-border purchases more attractive for consumers (see Recital 11 of the Proposal). It is correct that consumers do not read standard form contracts and this they do not know whether they are offered high quality or low quality terms and they do not relate

[37] O Bar Gill, O. B. Shahar 'Regulatory techniques in consumer protection: a critique of the Common European Sales Law', Working paper presented at the Conference on European Contract Law: A Law-and-Economics Perspective, April 27, 2012. Accessed 1 June 2012 at http://www.law.uchicago.edu/files/files/OBS-OBG%20paper_0.pdf

[38] C. Sunstein, 'Memorandum for the heads of executive departments and agencies', Title: 'Informing Consumers through Smart Disclosure', 8 September 2011. Accessed at 23 July 2012 at http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf

price with terms' quality. In this sense, standardisation could be a solution to the problem of reading costs of both parties.[39]

A. Standardized Consumer Contracts

In general, contracts are standardized where across different (though not necessarily all) traders and customers in a given market, individual contracts mainly consist of the same pre-defined boilerplate identifiable by the same label, allowing for individual variations only to a very limited extent, in particular regarding the quality and quantity of the contract goods and the contract price.[40]

Contracts standardization has received some attention in scholarly and policy debate and it has been indicated as a technique for consumer protection grounding on the insights of behavioural research. The point is that standardized contracts can help to solve the information problem that is the main cause of imbalanced relationship between the consumer and the traders (e.g. problems concerning the scarce propensity to read the contractual terms or to understand them). And this technique can also be helpful to solve the reading problems and other cognitive biases of consumers in this respect as discussed in the first sections (e.g. sunk cost effects). For example, a standardized contract drafted by a public authority relieves the consumer from the need to read it and to understand it: consequently, this strategies represent a solution of the information problem and contribute to overcome the before illustrated consumer biases related to contracts (lack of attention, understanding and other biases). One author suggests that legislatures should contemplate drafting standard form contracts for specific business sectors in which consumers are especially vulnerable to enhance the quality of standard terms, especially since consumers cannot be expected to discipline the market.[41] Another scholar also suggests that a set of default terms might be proposed for specific, relatively homogeneous, industries by the administrative authority. Sellers would have to specify where they depart from the pre-drafted terms.[42]

The key issue is how such a measure would be designed in concrete: there are several types of model forms: they could be drafted by Parliaments, regulatory agencies or by public authorities protecting the interest of consumers, such as the Consumer Ombudsman, or consumer authorities. Often, private organisation drafts these models in negotiations by business and consumer interest representatives (self-regulation), while in some cases these private bodies are stimulated by public authorities (i.e. co-regulation). This stimulation can be regarded as co-regulation, a form of self-regulation. It corresponds to the new governance approach that is becoming more prevalent in regulation. Representatives of both parties to the contract can be requested or even required to negotiate a model set of standard terms. In the case of consumer contracts, these

[39] A. L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, Journal of Institutional and Theoretical Economics JITE, Volume 167, Number 1, March 2011, pp. 30-44(15).
[40] T. Ackermann *Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?* (2012) Paper presented at the Conference on European Contract Law: A Law-and-Economics Perspective University of Chicago, 27-28April, 2012. Accessed on January 2, 2013 at http://www.law.uchicago.edu/files/files/Ackermann%20paper.pdf
[41] M. A. Eisenberg, (1985). Text Anxiety. Southern California Law Review, 59(2), pp. 305-311.
[42] S. I. Becher, (2007). Behavioral Science and Consumer Standard Form Contracts. Louisiana Law Review, 68(1), pp. 117-179. (2008). The same author: Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met. American Business Law Journal, 45(4), pp. 723-774.

negotiations are usually conducted between trade and consumer organisations, and some public entity.[43]

B. CESL

Having in mind the conceptual framework introduced before, the CESL rules about consumer contracts can be understood as a form of supply by public authorities - the EU Commission - of an optional standardized model (or optional standardized models) of contract for businesses and consumers. Such optional standardized contract is a body of rules that can in principle only be adopted or rejected as a whole and at best allows for limited variations. Indeed, the notion of optional standardized contracts supplied by states is not new: in the field of company law, states (and, more recently, the EU) habitually provide optional standardized contracts with a particular name.[44]

Precisely, CESL rules for consumer contracts are bound to be uniform to a large extent. But, the wealth of mandatory rules in favour of consumers, combined with a rigid policing of standard terms, imposes a particular model of high-quality contracts (at correspondingly high prices) on market participants that may suit the preferences of some consumers, but drives out low-quality contracts (at lower prices) for which demand may also exist.

However, what could be regarded as undue restrictions of contractual freedom may possibly turn out as requirements for the development of optional standardized consumer contracts under a EU, or "the EU-label". While not precluding cheaper low-quality contracts under another label, European contracts may allow to satisfy demand by consumers with a preference for high-quality contracts where otherwise, due to adverse selection driven by reading costs, only low-quality contracts would be offered.

This label will work only if the parties of the contract – better the trader – will decide to opt-in for the CESL and there are serious concerns that this will happen.

[43] H. Collins (Ed.) *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, (Alphen aan den Rijn: Kluwer Law International 2008) at 105.

[44] G. Hertig and J. A. McCahery, *A Legal Options Approach to EC Company Law* (2006). Amsterdam Center for Law & Economics Working Paper No. 2006-01. Accessed on January 3, 2013 at SSRN: http://ssrn.com/abstract=882388 or http://dx.doi.org/10.2139/ssrn.882388